

LEGAL ISSUES ASSOCIATED WITH BAT GATE CONSTRUCTION

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Abstract

Legal considerations are a part of any bat gating project. Legal considerations begin with the project planning process, and depending on the legal jurisdiction, may continue long past the design life of the closure. Projects constructed on Federal lands or with Federal funds must comply with the National Environmental Policy Act and myriad other laws. Projects built with State, local or private funds must also comply with certain environmental, zoning, or labor related statutes. Once bat gates are constructed, they may be compromised by natural weathering processes, vandalism, or land development activities. Government land managers, private landowners, and others involved with bat gate construction or management must consider the legal implications of long term monitoring and maintenance to avoid legal problems after a bat gate is constructed and the paint has dried. This paper provides an overview of the major legal considerations in developing a bat gate project and summarizes the experiences of several government agencies with regard to the legal implications of long-term gate maintenance.

Project Planning

Since most gates are constructed by governmental agencies, or in many cases at least on public lands, the project must comply with appropriate laws. The first is complying with the National Environmental Policy Act (NEPA) for Federal projects, or the State equivalent if the project is to take place on private land. Most States have "State environmental policy acts" usually referred to as SEPPA. There may also be local land use laws or building permits that may be required for either site grading or gate construction. A good place to check for requirements is at county building and planning departments for local requirements. On Federal projects you will also need to comply with other environmental laws such as the various antiquities acts, the Endangered Species Act, the Federal Cave Resources Protection Act (reproduced in the Appendix), and any decisions from previous environmental impact statements that may cover your area of work. Agencies also must follow regulations, which are the procedures by which they comply with laws. These also must be followed. For Federal agencies these are published in the Code of Federal Regulations. An example of the Forest Service 36 CFR Ch. II, Part 290-Cave Resource Management is reproduced in the Appendix. State laws are similarly reproduced and provide guidance for certain types of projects. It is the job of the planner to become acquainted with the laws that apply and assure these are met as a part of project planning and design.

Post Construction Protection Issues

Bat gates are constructed most commonly to protect vulnerable resources in a cave or mine or to prevent exposure of people to hazards within. More often than not, gates are constructed to fulfill both purposes. Bat gates are built to last many years and provide the desired levels of protection with minimal maintenance. However, even the latest designs and best materials do not always succeed in keeping vandals, cave robbers, or innocent explorers from attempting to breach some bat gates. Damaged gates present risks to the bats, cave resources, and the citizens we strive to protect. Damaged gates also present liability risks to the government agencies and private parties on whose lands the gates are constructed.

Land managers must be concerned about preventing, detecting, and repairing damage to bat gates for several reasons. First, construction of bat gates requires commitment of both funds and human resources. When gates are damaged by vandals, they must be repaired or replaced. Repairs can cut deeply into already limited maintenance budgets and reduce money available for other projects. Second, people who break into mines and caves often cause damage to cave formations and cultural or historic resources and may also disturb bat populations with disastrous results. Cave and abandoned mine resources are often non-renewable resources. Whether they are biological resources such as bats and cave salamanders or historic resources such as old mining equipment. Land management agencies are responsible for the protection of these resources. Loss or damage of these resources may be construed as failure of the agency to carry out its trust responsibilities to the public. Third, unauthorized access to caves and mines may lead to injury or death of people who enter. This exposure is not merely limited to the person that breaches the gate. Once a breach to the armor of the mine or cave is made, then other curious visitors may easily enter and suffer consequences never anticipated. In the following paragraphs, we will discuss some situations where bat gates or other closures were breached by vandals with tragic results. We will then discuss methods and strategies used by various agencies to: (1) reduce vandalism and unauthorized entry; (2) to aid in prosecution of vandals; and (3) reduce liability risk to gate builders and land managers.

Deterrents To Vandalism

Government agencies use a number of different methods to reduce vandalism. At Mammoth Cave National Park in Kentucky, park officials have found that public education, improved gate design and successful prosecution of vandals has reduced the incidence of vandalism and illegal entry to the many gated caves in the park (improved prosecution will be discussed later in this paper). Information brochures and signs at cave entrances educate the public on reasons why cave access is restricted and advise them of penalties for unauthorized entry to gated caves. Other agencies have observed similar results. The National Forest Service has also found that bat gate vandalism has been substantially reduced in recent years through a combination of increased public education, better gate designs, and better locks. Several agencies report that installation of concrete footers below bat gates has reduced the incidence of successful entry of gated mines and caves by vandals and cave robbers. It appears that digging under gate structures was a common method of breaching older bat gate designs. Many old bat gates constructed of simple rebar are now being replaced with newer designs and materials to better

withstand the cutting torches and hacksaws of vandals. In several Bureau of Land Management (BLM) districts, officials have identified and involved recreational user groups, such as caving clubs, early in the planning process for a cave closure thereby significantly reducing misunderstandings and vandalism as well. Caving organizations have proven to be important allies to gate monitoring and protection efforts.

Prosecution Of Vandals And Cave Robbers

Caves and mines on public lands contain resources that must be protected by land management agencies. They may contain biota, cultural, geologic, mineralogical, paleontologic, hydrologic, recreational, educational, or other resources. Caves on Federal lands must be protected as directed by the Federal Cave Resources Protection Act of 1988, and by associated regulations (see appendix A). Federal, State and local agencies responsible for protecting and managing these resources have been held responsible in situations where resources were damaged by vandals. At Mammoth Cave National Park, cave robbers dug under a bat gate at Crystal Cave and stole speleothems in 1995. Three young men were apprehended and convicted to sentences ranging from 22 to 33 months. The crime was "Destruction of Government Property." The judge felt so strongly about the offence that he added points to the sentence of one of the offenders for "damaging a non-renewable resource" associated with damaging and removing the speleothems. The records of these three men were not the only things damaged by the event. The National Park Service also received a considerable amount of negative coverage in the news media including accusations of failure to protect public resources.

Agencies have taken different approaches to improve the success of prosecution efforts. When the U.S. Forest Service closes a mine or cave, the Forest Supervisor can issue a Subpart B Order to prohibit public access to a mine, cave, or other area. Subpart B Orders, prepared under authority of Section 36 of the Code of Federal Regulations, are legally enforceable and can be issued quickly if necessary. A Closure Order may be permanent or the Closure Order may be in effect seasonally to protect bats at maternity or hibernation sites.

The Bureau of Land Management (BLM) has found that a different tool helps to promote successful prosecutions. BLM managers have found that a combination of early public involvement, barrier erection (such as a fence or bat gate), and publication of a closure notice in the Federal Register, provides the basis for successfully prosecuting vandals and others who break into gated caves and mines. BLM officials report that this approach has been effective in assuring successful prosecution when vandals are apprehended. The difficulty in apprehending vandals remains a major impediment to prosecution because of the remoteness of many BLM sites.

Liability Of Agencies And Landowners

Landowner and agency objectives for gating mines may be significantly different than for gating caves and exposure to liability may differ as well. Generally, mines are closed for two purposes, to protect the curious from the possibility of death or injury, and secondly, to protect bats and their habitat. Mines occasionally contain historic or cultural resources, but these are less common than in caves. Caves are generally gated to protect sensitive resources such as those outlined in the Federal Cave Resources

Protection Act. By in large, caves do not present the same hazards to exploration as do mines and are seldom gated due to safety concern. Cave exploration is recognized as a legitimate recreational use of Federal lands, both in regulations and in management policy. Many States have laws that protect landowners, including government agencies, from law suites stemming from recreational use of their lands. However, these laws differ from State to State and some States may lay at least a limited responsibility on landowners when hazardous conditions are known to them. A review of your specific State law is suggested.

Discussions with mine reclamation professionals and reclamation program managers reveal that liability exposure (i.e. risk of being sued) is their greatest concern about building bat gates in lieu of solid closure methods on abandoned mines. This concern is demonstrated both in the failure of some agencies to perform bat assessments, except where endangered species are present, and in the aversion of many managers to building bat gates unless required by regulatory agencies. Failure of reclamation agencies to evaluate mines for use by bats results in destruction of important habitat and sometimes, destruction of thousands of bats (Tuttle and Taylor 1998). In most cases, the concern over being sued is based on conjecture and fear rather than on the case history.

Homer Milford assessed the issue of agency liability and increased probability of a successful lawsuit in a paper written for the November 2000 forum “Bats Conservation and Mining: A Technical Interactive Forum” in St. Louis, Missouri (Milford, 2000). In researching that paper, Milford and his collaborators reviewed case law dealing with bats, bat gates, and abandoned mines. They found no cases dealing with liability for bat gates and only one case dealing with abandoned mines. In that case, *Miller v. River Hills Development*, 831 S. W. 2d 756 (Mo. App. 1992), a private landowner was sued on behalf of a fourteen year old boy who fell into abandoned mine shaft after: (1) breaching a steel barricade and a fence; (2) ignored a sign warning of the danger; and (3) he knew of the danger. The Missouri Court of Appeals affirmed a lower court ruling that the landowner was not liable (Milford, 2000).

In another case, not cited by Milford, the Oklahoma Conservation Commission, was found negligent in a case where a boy entered a abandoned mine shaft and died of asphyxiation *Reif v. State ex rel. Oklahoma Conservation Commission* (1993). Numerous parties were named in the \$21,000,000 lawsuit, however, the judge dismissed several defendants and two defendants settled out of court for \$105,000. The Conservation Commission was found negligent because the Abandoned Mine Land (AML) Program did not find the mine shaft and fill it. The jury awarded \$17,000 to the family of the boy for medical and funeral expenses. The boy was known to have entered the shaft several times before the incident. The judge found that the boy and the Conservation Commission were each 50 percent negligent and reduced the award by half for that reason. In the end, the Conservation Commission did not have to pay any of the jury award because of the previous \$105,000 settlement by two other parties. This situation did not involve any bat gates or other actions by the Conservation Commission. Instead, it involved the failure of the Conservation Commission to be aware of the mine-shafts and to act upon them.

It appears that no Federal agency has been successfully sued in the United States in response to an injury or death as a result of a breached bat gate. Milford tells us that his review did not reveal any case in which someone was injured by breaching a bat compatible closure (Milford 2000). In further researching this paper, discussions between this author and the U.S. Forest Service (Trout Personal Communication 2002), National Park Service (Olson and Burghart, Personal Communication, 2002) and the Bureau of Land Management (Goodbar Personal Communication, 2002) did reveal instances where people have been injured or killed in connection with abandoned mines. Yet, none of these instances have resulted in a successful lawsuit against a government agency over the breach of a bat compatible closure and subsequent injury. It may be useful to review the known situations where people were injured to see if they reveal information relevant to the assessment of agency risk.

- The BLM has had two fatalities in recent years related to mines or caves. One occurred as four adults and a group of school children explored a cave that was wide open and had no access control. One of the adults was killed when a large rock broke loose and crushed him. The family sued but the judge found that BLM was not culpable, since the BLM: (1) did not know that the cave existed; (2) did not know that hazards existed; (3) had not issue a permit for the activity; and (4) had no management plan. The judge did not find BLM liable in this case.
- Another fatality occurred near Las Cruces, NM. Teenagers were playing near an old mine entrance that was covered by a cable net. The net was not securely fastened. One of the youngsters jumped out on the net and it collapsed. He fell into the mine and died. BLM was not found culpable in this case and the agency was not sued.
- Colorado has had three situations where people have been injured or killed after the State installed or modified a mine closure or steel door. None of these was designed specifically as a bat gate but the situations are similar. The agency was not successfully sued in these cases.
- On August 13, 1989, five teenage boys attempted to explore a mine where a solid steel door had been vandalized. Four boys entered the mine and one stayed outside. Three of the 4 died from lack of oxygen. The fourth climbed up on a ledge or pile of material and survived. The dead were aged 15, 16, and 17 years. The Colorado Inactive Mines Program had modified the door used for entry into the mine some years before. When the State originally inventoried the mine, staff found a thick steel door in place but the hasp was damaged beyond repair. Colorado determined that the door was adequate but it needed a good protected hasp and lock to keep it secure. Colorado modified the door, adding the hasp and lock. It is still not known who vandalized the new hasp. After the accident, Colorado welded the steel door closed to prevent future entry.
- In another situation near Grand Junction, Colorado, the State installed a culvert pipe and grate to prevent access to a sloping mine entry. Vandals tore the grate from the opening, apparently with a truck. Sometime later, two people entered the opening. Only one survived. The other, a 20 year-old male, died from asphyxiation.

- In a third situation, explorers entered a gated mine through a stope that opened up after the gate was installed. The gate was not actually breached. One of the explorers used a rope to rappel into the shaft only to find out that the rope did not reach the bottom. He fell to the bottom and had to be rescued.

Do these examples prove that there is no increased liability risk when choosing a bat gate over a solid closure? The answer is probably “no.” As Milford reminds us, liability exposure differs from State to State based on State laws. Each agency’s legal counsel must review the risk of tort liability and develop policy accordingly (Milford, 2000). We can only provide examples of what other agencies do to reduce liability exposure and, at the same time, operate a program to gate caves and mines when resource management considerations dictate that bat gates are the most appropriate solution.

As we discussed in the section entitled “Prosecution Of Vandals And Cave Robbers,” the U.S. Forest Service and Bureau of Land Management take a two-stage approach to mine and cave closure with the multiple objectives of lowering risk of public injury and protecting natural and cultural resources. While the agencies differ in the procedural measures followed, the results are similar. Both agencies take positive steps to notify the public of closure actions and consider public comments. They also design and construct closure structures that are appropriate to the hazard risk. In addition, well before any of these actions are taken, both agencies use standard assessment forms, completed by field staff, to determine if and for what reason mines or caves should be closed to public access. These forms serve several purposes. They help guide managers in deciding what actions to take regarding a mine or cave. They also help support agency actions when meeting or answering questions by the public. And finally, they help support agency decisions should someone be injured in association with a closure.

A review of policies in two State Abandoned Mine Reclamation Programs revealed somewhat different approaches to the issue. The Utah Abandoned Mine Program was one of the first State reclamation programs to adopt a regular policy of gating abandoned mines used by bats. Utah has had a couple of instances where bat gates have been breached but none have resulted in injury or death. Utah has implemented a monitoring program to keep track of bat response to gates and to ensure that gates remain secure. This monitoring program has resulted in several revisions to gate designs, including improved materials, changed bar and stiffener spacing, and improved gate anchoring practices (Mesch Personal Communication, 2002). Utah does not normally consider replacing a bat gate with a solid closure when vandalism occurs. When a gate is damaged, it is replaced with another gate of the most recent design. The success of this monitoring and gate improvement program is demonstrated by the fact that the Utah AML Division has not had a bat gate breach using the latest gate design.

The Colorado Inactive Mines Program constructs many bat compatible closures on abandoned mine openings. The decision to construct a bat gate is based on many factors including the integrity of the mine opening and current or potential use by bats. Liability is not a major factor in deciding whether to use a bat gate or solid closure. The decision is based on what best suits the situation. However, Colorado does practice a “one strike and your out” policy on gates and other non-backfill type mine closures. If a gate or door is breached by vandals just one time, it is replaced by a backfill type closure. (This policy was not in place when the door was damaged in 1989.)

In Colorado, landowners are responsible, under State law, to close mines or otherwise protect the public from mine openings. For abandoned mines, this protection usually consists of a fence and sign unless the AML program is involved. However, the Colorado AML program feels that this “statutory responsibility of the landowner” provides an adequate level of protection to the State for implementation of a mine gating program.

These examples show how agencies have taken positive steps to address the issue of agency liability for bat gate construction while ensuring that both natural and human resources are protected. While they might not prove to be the right answer for all agencies and private landowners, they may serve as guides for development policies and practices unique to your situation.

Bat Gate Monitoring and the Relation to Liability Exposure

Once it has been determined that a bat gate is the method which will be employed to close a mine or cave, it is important that the structure be sound and robust. To be successful the gate must withstand attempts by vandals to force entry. If a gate is breached, and not repaired, the agency or landowner could be found liable if a third party injury occurs. Failure to properly maintain a gate, or any closure, can place the agency or landowner on precarious legal footing if an injury takes place.

Bat gates should be inspected on a regular basis as set forth in a monitoring plan. The plan should specify the frequency of the inspections and a time frame for repairs if deficiencies are discovered. A monitoring program can reduce exposure to liability and increase the safety and integrity of new bat gates provided the monitoring program is followed and that follow up actions are taken as specified. If a monitoring program is followed and an injury were to take place due to an undiscovered breach that occurred between monitoring visits, it would be difficult to hold an agency or landowner at fault for not maintaining the closure. If, however, the monitoring plan is not followed, or there is no follow-up repair once the damage is known, the agency or landowner might be more likely to be found responsible for any injuries that occur.

Organizations that construct bat gates should consider developing partnerships with landowners, wildlife management agencies, caving clubs, or other organizations to conduct monitoring of bat gates. These partnerships can save gating agencies money, manpower, and possibly legal liability or embarrassment.

State wildlife agencies and caving organizations might be willing and able to provide both structural monitoring and bat population monitoring. Bat population information can be useful for evaluating the effectiveness of gates for bat access. Information on bat population increases or decreases can be invaluable during the early years after a gate is installed because it indicates whether bats are accepting the gates and whether predators or taking undue advantage of the gate structures. These types of partnerships can be the most useful because the organizations may have resources to understand the full range of issues at a mine or cave site.

Partnerships with landowners or organizations such as County Sheriff Departments can be effective for

ensuring early detection and repair of gate vandalism. These partnerships can be encouraged by advising parties that your organization will repair vandalized gates but you do not have the resources to perform the monitoring. Agreements that state, for example, that a landowner will monitor a site semi-annually and advise the State AML program of damages, can save the State program substantial monitoring costs. On the other side of the agreement, the State AML program might agree to repair vandal damage for a period of years when notified by the landowner. This type of agreement gives the landowner an incentive to monitor because it reduces his risk of liability and his cost of repairs. The State program benefits because the landowner performs the monitoring and advises the agency when repairs are needed. The State also benefits because a written agreement tells who is responsible for what action, in case an injury does occur. While landowners are ultimately responsible in most States for situations that occur on their land, such a written agreement may still provide additional protection to the agency that constructed the gate.

Local law enforcement agencies might also agree to monitor high activity sites on a regular basis if there is a history of problems with a cave or mine. The benefit for them is that when a breach is detected, they have someone to notify that will repair the damage and make the closure secure again. Again, the State AML agency gains by not having to worry over the monitoring activity.

There may be many other opportunities for bat gate monitoring partnerships. We have probably only scratched the surface here. However, the important consideration is that monitoring is essential for the long-term protection of the resources, protection of the public from injury, and protection of the agency from liability.

References

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Appendix

FEDERAL CAVE RESOURCES PROTECTION ACT OF 1988

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Public Law 100-691
100th Congress

An Act

To protect cave resources on Federal lands, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

SECTION 1. SHORT TITLE.

This Act may be referred to as the "Federal Cave Resources Protection Act of 1988".

SECT. 2. FINDINGS, PURPOSE, AND POLICY.

(a) Findings.--The congress finds and declares that--

- (1) significant caves on Federal lands are an invaluable and irreplaceable part of the Nation's natural heritage; and
- (2) in some instances, these significant caves are threatened due to improper use, increased recreational demand, urban spread, and a lack of specific statutory protection.

(b) Purposes.--The purposes of this Act are--

- (1) to secure, protect, and preserve significant caves on Federal lands for the perpetual use, enjoyment, and benefit of all people; and
- (2) to foster increased cooperation and exchange of information between governmental authorities and those who utilize caves located on Federal lands for scientific, educational, or recreational purposes.

(c) Policy.--It is the policy of the United States that Federal lands be managed in a manner which protects and maintains, to the extent practical, significant caves.

SEC. 3. DEFINITIONS.

For purposes of this Act:

(1) **CAVE.** -- The term "cave" means any naturally occurring void, cavity, recess, or system of interconnected passages which occurs beneath the surface of the earth or within a cliff or ledge (including any cave resource therein, but not including any vug, mine, tunnel, aqueduct, or other manmade excavation) and which is large enough to permit an individual to enter, whether or not the entrance is naturally formed or manmade. Such term shall include any natural pit, sinkhole, or other feature which is an extension of the entrance.

(2) **FEDERAL LANDS.** -- The term "Federal lands" means lands the fee title to which is owned by the United States and administered by the Secretary of Agriculture or the Secretary of the Interior.

(3) **INDIAN LANDS.** -- The term "Indian lands" means lands of Indian tribes or Indian individuals which are either held in trust by the United States for the benefit of an Indian tribe or subject to restriction against

alienation imposed by the United States.

(4) **INDIAN TRIBE.** -- The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village or regional or village corporation as defined in, or established pursuant to, the Alaska Native Claims settlement Act (43 U.S.C. 1601 et seq.).

(5) **CAVE RESOURCE.** -- The term "cave resource" includes any material or substance occurring naturally in caves on Federal lands, such as animal life, plant life, paleontological deposits, sediments, minerals, speleogens, and speleothems.

(6) **SECRETARY.**--The term "Secretary" means the Secretary of Agriculture or the Secretary of the Interior, as appropriate.

(7) **SPELEOTHEM.** -- The term "speleothem" means any natural mineral formation or deposit occurring in a cave or lava tube, including but not limited to any stalactite, stalagmite, helectite, cave flower, flowstone, concretion, drapery, rimstone, or formation of clay or mud.

(8) **SPELEOGEN.** -- The term "speleogen" means relief features on the walls, ceiling, and floor of any cave or lava tube which are part of the surrounding bedrock, including but not limited to anastomoses, scallops, meander niches, petromorphs and rock pendants in solution caves and similar features unique to volcanic caves.

SEC. 4. MANAGEMENT ACTIONS.

(a) Regulations.--Not later than nine months after the date of the enactment of this Act, the Secretary shall issue such regulations as he deems necessary to achieve the purposes of this Act. Regulations shall include, but not be limited to, criteria for the identification of significant caves. The Secretaries shall cooperate and consult with one another in preparation of the regulations. To the extent practical, regulations promulgated by the respective Secretaries should be similar.

(b) In General.--The Secretary shall take such actions as may be necessary to further the purposes of this Act. Those actions shall include (but not be limited to)--

(1) identification of significant caves on Federal Lands:

(A) The Secretary shall prepare an initial list of significant caves for lands under his jurisdiction not later than one year after the publication of final regulations using significance criteria defined in such regulations. Such a list shall be developed after consultation with appropriate private sector interests, including cavers.

(B) The initial list of significant caves shall be updated periodically, after consultation with appropriate private sector interests, including cavers. The Secretary shall prescribe by policy or regulation the requirements and process by which the initial list will be updated, including management measures to assure that caves under consideration for the list are protected during the period of consideration. Each cave recommended to the Secretary by interested groups for possible inclusion on the list of significant caves shall be considered by the Secretary according to the requirements prescribed pursuant to this paragraph, and shall be added to the list if the Secretary determines that the cave meets the criteria for significance as defined by the regulations.

(2) regulation or restriction of use of significant caves, as appropriate.

(3) entering into volunteer management agreements with parsons or scientific and recreational caving community; and

(4) appointment of appropriate advisory committees.

(C) **PLANNING AND PUBLIC PARTICIPATION.**--The Secretary shall--

(1) ensure that significant caves are considered in the preparation or implementation of any land management plan if the preparation or revision of the plan began after the enactment of this Act; and

(2) foster communication, cooperation, and exchange of information between land managers, those who utilize caves, and the public.

SEC. 5. CONFIDENTIALITY OF INFORMATION CONCERNING NATURE AND LOCATION OF SIGNIFICANT CAVES.

(a) In General.--Information concerning the specific location of any significant cave may not be made available to the public under section 552 of title 5, United States Code, unless the Secretary determines that disclosure of such information would further the purposes of this Act and would not create a substantial risk of harm, theft, or destruction of such cave.

(b) Exceptions.--Notwithstanding subsection (a), the Secretary may make available information regarding significant caves upon the written request by Federal and State governmental agencies or bona fide educational and research institutions. Any such written request shall, at a minimum--

(1) describe the specific site or area for which information is sought;

(2) explain the purpose for which such information is sought; and

(3) include assurances satisfactory to the Secretary that adequate measures are being taken to protect the confidentiality of such information and to ensure the protection of significant cave from destruction by vandalism and unauthorized use.

SECT. 6. COLLECTION AND REMOVAL FROM FEDERAL CAVES.

(a) PERMIT.-- The secretary is authorized to issue permits for the collection and removal of cave resources under such terms and conditions at the Secretary may impose, including the posting of bonds to insure compliance with the provisions of any permit:

(1) any permit issued pursuant to this section shall include information concerning the time, scope, location, and specific purpose of the proposed collection, removal or associated activity, and manner in which such collection, removal, or associated activity is to be performed must be provided.

(2) the secretary may issue a permit pursuant to this subsection only if he determines that the proposed collection or removal activities are consistent with the purposes of this Act and with other applicable provisions of law.

(b) REVOCATION OF PERMIT.--Any permit issued under this section shall be revoked by the Secretary upon determination by the Secretary that the permittee has violated any provision of this Act, or has failed to comply with any other condition upon which the permit was issued. Any such permit shall be revoked by the Secretary upon assessment of a civil penalty against the permittee pursuant to section 8 or upon the permittee's conviction under section 7 of this Act. The Secretary may refuse to issue a permit under this section to any person who has violated any provision of this Act or who has failed to comply with any condition of a prior permit.

(c) TRANSFERABILITY OF PERMITS.--Permits issued under this Act are not transferable.

(d) CAVE RESOURCES LOCATED ON INDIAN LANDS.--(1)(A) Upon application by an Indian tribe, the Secretary is authorized to delegate to the tribe all authority of the Secretary under this section with respect to issuing and enforcing permits for the collection or removal of any cave resource, or to carrying out activities associated with such collection or removal, from any cave resource located on affected Indian Lands.

(B) In the case of any permit issued by the Secretary for the collection or removal of any cave resource, or to carry out activities associated with such collection or removal, from any cave resource located on Indian lands (other than permits issued pursuant to subparagraph (A)), the permit may be issued only after obtaining the consent of the Indian or Indian tribe owning or having jurisdiction over such lands. The permit shall include such reasonable terms and conditions as may be requested by such Indian or Indian tribe.

(2) If the Secretary determines that issuance of a permit pursuant to this section may result in harm to, or destruction of, any religious or cultural site, the Secretary, prior to issuing such permit, shall notify any Indian tribe which may consider the site as having significant religious or cultural importance. Such notice shall not be deemed a disclosure to the public for purposes of section 5.

(3) A permit shall not be required under this section for the collection or removal of any cave resource located on Indian lands or activities associated with such collection, by the Indian or Indian tribe owning or having jurisdiction over such lands.

(e) EFFECT OF PERMIT.--No action specifically authorized by a permit under this section shall be treated as a violation of section 7.

SECT. 7. PROHIBITED ACTS AND CRIMINAL PENALTIES.

(a) PROHIBITED ACTS.--

(1) Any person who, without prior authorization from the Secretary knowingly destroys, disturbs, defaces, mars, alters removes or harms any significant cave or alters the free movement of any animal or plant life into or out of any significant cave located on Federal lands, or enters a significant cave with the intention of committing any act described in this paragraph shall be punished in accordance with subsection (b).

(2) Any person who possesses, consumes, sells, barter or exchanges, or offers for sale, barter or exchange, any cave resource from a significant cave with knowledge or reason to know that such resource was removed from a significant cave located on Federal lands shall be punished in accordance with subsection (b).

(3) Any person who counsels, procures, solicits, or employs any other person to violate any provisions of this subsection shall be punished in accordance with section (b).

(4) Nothing in this section shall be deemed applicable to any person who was in lawful possession of a cave resource from a significant cave prior to the date of enactment of this Act.

(b) PUNISHMENT.--

The punishment for violating any provision of subsection (a) shall be imprisonment of not more than one year or a fine in accordance with the applicable provisions of title 18 of the United States Code, or both. In the case of a second or subsequent violation the punishment shall be imprisonment of not more than 3 years or a fine in accordance with the applicable provisions of title 18 of the United States Code, or both.

SECT. 8. CIVIL PENALTIES.

(a) ASSESSMENT.--(1) The secretary may issue an order assessing a civil penalty against any person who violates any prohibition contained in this Act, any regulation promulgated pursuant to this act, or any permit issued under this Act. Before issuing such an order, the Secretary shall provide such person written notice and the opportunity to request a hearing on the record within 30 days. Each violation shall be a separate offense, even if such violations occurred at the same time.

(2) The amount of such civil penalty shall be determined by the Secretary taking into account appropriate factors including (A) the seriousness of the violation; (B) the economic benefit (if any) resulting from the violation; (C) any history of such violations; and (D) such other matters as the Secretary deems appropriate. The maximum fine permissible under this section is \$10,000.

(b) JUDICIAL REVIEW.-- Any person aggrieved by an assessment of a civil penalty under this section may file a petition for judicial review of such assessment with the United States District Court for the District of Columbia or for the district in which the violation occurred. Such a petition shall be filed within the 30-day period beginning on the date the order assessing the civil penalty was issued.

(c) COLLECTION.--If any person fails to pay an assessment of a civil penalty--

(1) within 30 days after the order was issued under subsection (a), or

(2) if the order was appealed within such 30-day period, within 10 days after court has entered a final judgment in favor of the Secretary under subsection (b),

the Secretary will notify the Attorney General and the Attorney General shall bring civil action in an appropriate United States district court to recover the amount of penalty assessed (plus costs, attorney's fees, and interest at currently prevailing rates from the date the order was issued or the date of such final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review.

(d) SUBPOENAS.-- Title Secretary may issue subpoenas in connection with proceedings under this subsection compelling the attendance and testimony of witnesses and subpoenas duces tecum, and may request the Attorney General to bring an action to enforce any subpoena under this section. The district courts shall have jurisdiction to enforce such subpoenas and impose sanctions.

SECT. 9. MISCELLANEOUS PROVISIONS.

(a) AUTHORIZATION.-- There are authorized to be appropriated \$100,000 to carry out the purposes of this Act.

(b) EFFECT ON LAND MANAGEMENT PLANS.--Nothing in this Act shall require the amendment or revision of any land management plan, the preparation of which began prior to the enactment of this Act.

(c) FUND.-- Any money collected by the United States as permit fees for collection and removal of cave resources; received by the United States as a result of the forfeiture of a bond or other security by a permittee who does not comply with the requirements of such permit issued under section 7; or collected by the United States by way of civil penalties or criminal fines or violations of this Act shall be placed in a special fund in the Treasury. Such moneys shall be available for obligation or expenditure (to the extent provided for in advance in appropriation Acts) as determined by the Secretary for the improved management, benefit, repair, or restoration of significant caves located on Federal lands.

(d) Nothing in this Act shall be deemed to affect the full operation of the mining and mineral leasing laws of the United States, or otherwise affect valid existing rights.

SEC. 10. SAVINGS PROVISIONS.

(a) WATER.-- Nothing in this Act shall be construed as authorizing the appropriation of water by any Federal, State, or local agency, Indian tribe, or any other entity or individual. Nor shall any provision of this Act--

(1) affect the rights or jurisdiction of the United States, the States, Indian tribes, or other entities over waters of any rivers or stream or over any ground water resource;

(2) alter, amend, repeal, interpret, modify, or be in conflict with any interstate compact made by the States; or

(3) alter or establish the respective rights of the States, the United States, Indian tribes, or any person with respect to any water or water-related right.

(b) FISH AND WILDLIFE.-- Nothing in this Act shall be construed as affecting the jurisdiction or responsibilities of the States with respect to fish and wildlife.

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Approved November 18, 1988.

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LEGISLATIVE HISTORY--H.R. 1975:

HOUSE REPORTS: No 100-534 (Comm. on Interior and Insular Affairs).

SENATE REPORTS: No. 100-559 (Comm. on Energy and Natural Resources).

CONGRESSIONAL RECORD, Vol. 134 (1988)

Mar. 28, considered and passed House.

Oct. 21, considered and passed Senate, amended. House concurred in Senate amendment.

Part 290-CAVE RESOURCES MANAGEMENT

Sec.

- 290.1 Purpose and scope.
- 290.2 Definitions.
- 290.3 Nomination, evaluation, and designation of significant caves.
- 290.4 Confidentiality of cave location information.
- 290.5 Collection of information.

AUTHORITY: 16 U.S.C. 4301-4309; 102 Stat. 4546.

SOURCE: 59 FR 31152, June 17, 1994, Unless otherwise noted.

§290.1 Purpose and Scope.

The rules of this part implement the requirement of the Federal Cave Resources Protection Act (16 U.S.C. 4301-4309), hereafter referred to as the “Act”. The rules apply to cave management on National Forest System lands. These rules, in conjunction with rules in part 261 of this chapter, provide the basis for identifying and managing significant caves on National Forest System lands in accordance with the Act. National Forest System lands will be managed in a manner which, to the extent practical, protects and maintains significant cave resources in accordance with the policies outlined in the Forest Service Directive System and the management direction contained in the individual forest plans.

§290.2 Definitions

For the purposes of this part, the terms listed in this section have the following meaning:

Authorized officer means the Forest Service employee delegated the authority to perform the duties described in this part.

Cave means any naturally occurring void, cavity, recess, or system of interconnected passages beneath the surface of the earth or within a cliff or ledge and which is large enough to permit a person to enter, whether the entrance is excavated or naturally formed. Such term shall include any natural pit, sinkhole, or other opening which is an extension of the cave entrance or which is an integral part of the cave.

Cave resources mean any materials or substances occurring in caves including, but not limited to, biotic, cultural, mineralogic, paleontologic, geologic, and hydrologic resources.

National Forest System Lands means all national forest lands reserved or withdrawn from the public domain, acquired through purchase, exchange, or donation, national grasslands and land utilization projects, and other lands, waters, or interests administered by the Forest Service.

Secretary means the Secretary of Agriculture.

Significant cave means a cave located on National Forest System Lands that has been determined to meet the criteria in §290.3 (c) or (d) and has been designated in accordance with §290.3 (e).

§290.3 Nomination, Evaluation, and designation of significant caves.

(a) *Nominations for initial and subsequent listings.* The authorized officer will give governmental agencies and the public, including those who utilize caves for scientific, educational, or recreational purposes, the opportunity to nominate caves. The authorized officer shall give public notice, including a notice published in the FEDERAL REGISTER, calling for nominations for the initial listing and setting forth the procedures for preparing and submitting the nominations. Nominations for subsequent listing will be accepted from governmental agencies and the public by the Forest Supervisor where the cave is located as new cave discoveries are made. Caves nominated but not approved for designation may be renominated as additional documentation or new information becomes available.

(b) *Evaluation for initial and subsequent listings.* The evaluation of the nominations for significant caves will be carried out in consultation with individuals and organizations interested in the management and use of caves and cave resources, within the limits imposed by the confidentiality provisions of §290.3 (c) and (d).

(c) *Criteria for significant caves.* A significant cave on National Forest System lands shall possess one or more of the following features, characteristics, or values.

(1) *Biota.* The cave provides seasonal or yearlong habitat for organisms or animals, or contains species or sub-species of flora or fauna native to caves, or are sensitive to disturbance, or are found on State or Federal sensitive, threatened, or endangered species lists.

(2) *Cultural.* The cave contains historic properties or archaeological resources (as defined in Parts 800.2 and 296.3 of this chapter respectively, or in 16 U.S.C. 420, *et seq.*) or other features included in or eligible for inclusion on the National Register of Historic Places because of their research importance for history or prehistory, historical associations, or other historical or traditional significance.

(3) *Geologic/Mineralogic/Paleontologic.* The cave possesses one or more of the following features:

(i) Geologic or mineralogic features that are fragile, represent formation processes that are of scientific interest, or that are otherwise useful for study.

(ii) Deposits of sediments or features useful for evaluating past events.

(iii) Paleontologic resources with potential to contribute useful educational or scientific information.

(4) *Hydrologic.* The cave is a part of a hydrologic system or contains water which is important to humans, biota, or development of cave resources.

(5) *Recreational.* The cave provides or could provide recreational opportunities or scenic values.

(6) *Educational or scientific.* The cave offers opportunities for educational or scientific use; or, the cave is virtually in a pristine state, lacking evidence of contemporary human disturbance or impact; or, the length, volume, total depth, pit depth, height, or similar measurements are notable.

(d) *Specially designated areas.* All caves located within special management areas, such as Special Geologic Areas, Research Natural Areas, or National Monuments, that are designated wholly or in part due to cave resources found therein are determined to be significant.

(e) *Designation and documentation.* If the authorized officer determines that a cave nominated and evaluated under paragraphs (a) and (b) of this section meets one or more of the criteria in paragraph (c) of this section, the authorized officer shall designate the cave as significant. The authorized officer will notify the nominating party of the results of the evaluation and designation. Each forest will retain appropriate documentation for all significant caves located within its administrative boundaries. At a minimum, this documentation shall include a statement of finding signed and dated by the authorized officer and the information used to make the determination. This documentation will be retained as a permanent record in accordance with the confidentiality provision in §290.4.

(f) *Undiscovered Passages.* If a cave is determined to be significant, its entire extent on federal land, including passages not mapped or discovered at the time of determination, is deemed significant. This includes caves that extend from lands managed by any other Federal agency into National Forest System land, as well as caves initially believed to be separate for which interconnecting passages are discovered after significance is determined.

(g) *Decision Final.* The decision to designate or not designate a cave as significant is made at the sole discretion of the authorized officer based upon the criteria in paragraphs (c) and (d) of this section and is not subject to further administrative review of appeal under Parts 217 or 251.82 of this chapter.

§290.4 Confidentiality of cave location information.

(a) *Information disclosure.* No Forest Service employee shall disclose any information that could be used to determine the location of a significant cave or a cave nominated for designation, unless the authorized officer determines that disclosure will further the purposes of the Act and will not create a substantial risk of harm, theft, or destruction to cave resources.

(b) *Requesting confidential information.* Notwithstanding paragraph (a) of this section, the authorized officer may make confidential cave information available to Federal or State governmental agencies, bona fide educational or research institutes, or individuals or organizations assisting the land management agencies with cave management activities. To request confidential cave information, such entities shall make a written request to the authorized officer which includes the following:

- (1) Name, address, and telephone number of the individual responsible for the security of the information received;
- (2) A legal description of the area for which the information is sought;
- (3) A statement of the purpose for which the information is sought; and,
- (4) Written assurances that the requesting party will maintain the confidentiality of the information and protect the cave and its resources.

(c) *Decision Final.* The decision to permit or deny access to confidential cave information is made at the sole discretion of the authorized officer and is not subject to further administrative review or appeal under 5 U.S.C. 552 or parts 217 or 251.82 of this chapter.

§290.5 Collection of information.

The collection of information contained in this rule represents new information requirements as defined in 5 CFR 1320, Controlling Paperwork Burdens on the Public. In accordance with those rules and the Paperwork Reduction Act of 1980 as amended (44 U.S.C. 3507), the Forest Service has received approval by the Office of Management and Budget to collect cave nomination information under clearance number 0596-0123 and confidential information under 0596-00122. The information provided for the cave nomination will be used to determine which caves will be listed as “significant” and the information in the requests to obtain confidential cave information will be used to decide whether to grant access to this information. Response to the call for cave nominations is voluntary. No action may be taken against a person for refusing to supply the information requested. Response to the information requirements for obtaining confidential cave information is required to obtain a benefit in accordance with section 5 of the Federal Cave Resources Protection Act of 1988 (16 U.S.C. 4304).